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NO.

# in the Supreme Court of the United States

OCTOBER TERM, 1985

PAUL H. COPLIN and
PATRICIA COPLIN,
*Petitioners*

*v.*

UNITED STATES OF AMERICA,
*Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the following language of Article XV(2) of the Implementation Agreement to Article III of the Panama Canal Treaty of 1977 is clear and definite in granting a bi-national tax exemption to U.S. citizen employees of the Panama Canal Commission?

> "United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission."

2. Whether the appellate court can rely on an *extra-record* diplomatic note of questionable reliability to reverse a well reasoned forty-six page trial court opinion which found that the above language clearly granted a bi-national income tax exemption to U.S. citizen employees of the Panama Canal Commission?

3. After informing the trial court that Panama's interpretation of the above language was of 'little value' and of 'little relevance' and after refusing to provide the trial court with evidence of Panama's interpretation, can the United States government (a party litigant with a substantial financial interest) subsequently submit evidence of questionable reliability at the appellate level purporting to demonstrate Panama's interpretation of the above language?

4. Was it improper for the appellate court to take judicial notice of that evidence filed by the United States just one day before oral argument?

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## MISCELLANEOUS

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## PETITION

The Petitioners Paul H. and Patricia Coplin respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on May 10, 1985, which reversed *Coplin v. United States*, 6 Cl.Ct. 115 (1984) and the order denying the Petitioners'

Petition for Rehearing entered in this proceeding by the United States Court of Appeals for the Federal Circuit dated July 3, 1985.

## OPINION BELOW

The opinion of the Court of Appeals as reported in *Coplin v. United States*, 761 F.2d 688 (Fed. Cir. 1985), *rev'g*, 6 Cl.Ct. 115 (1984), appears in the Appendix filed separately. The opinion of the United States Claims Court as reported in *Coplin v. United States*, 6 Cl.Ct. 115 (1984), also appears in the Appendix filed separately. These opinions, and an opinion of the United States Court of Appeals for the Eleventh Circuit in *Ralph Harris and Joan Harris v. United States*, 768 F.2d 1240, are reprinted in the appendix submitted concurrently herewith by the parties below. These cases involve identical or closely related questions sought to be reviewed on certiorari to the same court. Other petitioners whose cases were consolidated with the *Coplin, Supra.* appeal have joined in this appendix upon their peititions for certiorari.

## JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on May 10, 1985. A timely filed petition for rehearing was denied on July 3, 1985, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).



## CONSTITUTIONAL PROVISIONS, TREATY PROVISIONS AND STATUTES INVOLVED

Panama Canal Treaty Between the United States of America and Panama, September 7, 1977, 33 U.S.T. ____, T.I.A.S. No. 10029 (Hereinafter "Treaty"):

> Article III, Paragraph 9 states:
> The rights and legal status of the United States Government agencies and employees operating in the Republic of Panama pursuant to this Article, shall be governed by the Agreement in Implementation of this Article, signed this date.

Agreement Between the United States of America and Panama in Implementation of Article III of the Panama Canal Treaty, September 7, 1977, 33 U.S.T. ____, T.I.A.S. No. 10030 (Hereinafter "Implementation Agreement"):

> Article XV paragraph (2) states:
> 2. United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission. Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.

U.S. CONST. amend. V (Due Process Clause):

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . .

U.S. CONST. art. VI, cl. 2 (Supremacy Clause):

> This Constitution, . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . .

F.R.A.P.Rules 10(a) and 30(a), 28 U.S.C.A.

> Rule 10 (a):
> . . . The original papers and exhibits filed in the district court . . . shall constitute the record on appeal in all cases.
>
> Rule 30(a):
> . . . The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record . . .

## STATEMENT OF THE CASE

The Panama Canal Treaty of 1977 between the United States and the Republic of Panama went into effect on October 1, 1979. The Treaty was controversial in both countries and negotiations were heated. The Treaty changed a unique relationship between the two countries that began in 1903.[1]

[1]In 1903 the United States recognized the newly formed nation of Panama and a few days thereafter entered into a treaty to build the Panama Canal. That treaty granted the United States rights in perpetuity to construct and operate a Canal within a zone 10 miles wide crossing Panama over which the United States would exercise rights, powers and authority as if it were the sovereign.



This case concerns the interpretation of clear language in the Implementation Agreement to Article III of the Panama Canal Treaty. The language in issue, which was written by the government says:

* * * *

(Footnote 1 Continued)

That 50 square mile area surrounding the Canal was known as the Canal Zone: an exclusive self-sufficient area with its own civil government. The Canal Zone existed in the middle of Panama and literally bisected the country with entrances on each coast. Panamanians who wished to travel the breadth of their country had to enter the Canal Zone and in doing so were subject to the Canal Zone laws, police, courts and jails. The building of the Panama Canal, which was an engineering marvel, and the highly efficient operation of the Canal and Canal Zone, are monuments of pride to the United States. However, Panamanians have always felt mixed emotions about a foreign power occupying 50 square miles of their best land. Often, those emotions would tend towards frustration and resentment against the United States. The sovereign rights granted in perpetuity to the United States were not acceptable to Panama.

In 1964 rioting broke out on the Canal Zone border and diplomatic relations were broken. The United States realized that a new treaty was necessary. The 1977 Panama Canal Treaty was the culmination of negotiations that began in 1964.

In 1976, President Carter stepped up negotiations for a new treaty with Panama. The individuals chosen to represent Panama on its negotiating team were working towards possibly the greatest historical event of their country—the retrieval of total sovereignty. The negotiating process riveted the attention of the people of the Canal Zone and Panama through 1977 and 1978. The Treaty, which relinquished the sovereign rights exercised by the United States over the Canal Zone to Panama, was accepted and ratified by each country's legislative body. At midnight, October 1, 1979, the new Treaty went into effect and the first official act of Panama was to raise a huge national flag over Ancon hill, a prominent elevation visible throughout Panama City.

2. *United States Citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission.* Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama. (Emphasis added).

Paragraph 2, Article XV, Agreement between the United States of America and Panama in Implementation of Article III of the Panama Canal Treaty, September 7, 1977, 33 U.S.T. ____, T.I.A.S. No. 10030

* * * *

The gist of the controversy in this case is that the government maintains that this language does not mean what it says. The petitioners contend that this language, by its own express terms, exempts U.S. citizen employees of the Panama Canal Commission from U.S. income taxation. This action and many others have arisen because of the government's position.

## A. The Negotiations And Taxation As An Issue

The negotiating transcripts produced at trial show that a sovereignty issue arose over Panama's right to tax the salaries of the U.S. employees of the Commission.[2]

[2]In June of 1977, negotiations were proceeding on the taxation issue. Panama's position was that the operation of the Canal was essentially a commercial activity. Accordingly, it wanted to exercise its sovereign right to tax all employees of the entity operating the Canal. The United States did not want to establish a precedent



Panama viewed the right to tax the income of the U.S. employees as an authority created by its retrieval of sovereignty over the Canal Zone. The United States negotiating team was opposed to taxation by Panama because it would create an undesirable precedent for other United States Government operations overseas and would make it more difficult to obtain the Senate's advice and consent. There were many vocal Treaty opponents in the United States.

The transcripts indicate that the two teams discussed this tax/sovereignty issue numerous times and that their positions hardened as the Treaty completion deadline neared. During the dispute, the U.S. team made four drafts of Article XV; the difference between the first and last drafts was that the reference to Panamanian law was deleted. Only the final draft was presented to the Panamanian delegation. There is a gap in the

(Footnote 2 Continued)

where employees of a United States Government agency would be taxed by a foreign sovereign. This might cause problems in negotiations with other countries. The negotiations were deadlocked. Neither signatory could agree on this issue. It was clear to the State Department that this was a sovereignty issue with minor economic results in the eyes of the Panamanians. It was not simply a matter of money.

As the negotiations progressed, the taxation issue became a greater problem as the sovereignty issue became more sensitive and heated. The trial court held that Panama ultimately agreed to the language in a good faith compromise of its position feeling that the United States was likewise compromising. Neither country would tax the employees.

negotiating transcripts[3] from July 19, 1977, to the last meeting in August of 1977, when the United States and Panama agreed to the exemption language then presented. The affidavit of Dr. Carlos Lopez Guevara, the Panamanian negotiator of this tax provision, shows that Panama accepted it as a bi-national tax exemption. The affidavit is part of the *Coplin* record.

After the exemption language was accepted by Panama and approved by a Panamanian plebiscite pursuant to the Panamanian Constitution, the United States Department of State told the United States Senate, the United States employees of the Commission and numerous United States courts that Article XV(2) exempted the United States employees from Panamanian taxation only and was not reciprocal. However, there is no evidence that the U.S. government informed Panama of this different interpretation.

The following excerpt from the colloquy between Senator Richard Stone and the former legal advisor to the Department of State, Herbert Hansell, during the Senate Foreign Relations Committee Hearings in 1977, illustrates the attention that this tax exemption clause received.

* * *

[3]The Government has admitted that incomplete records of the negotiations were kept by the U.S. team. A confidential position paper dated May 3, 1977, is in evidence which describes the American position and objectives. However, there is nothing which tells us about the Panamanian position other than the language of the provision at the time the treaty was signed.



SENATOR STONE: . . . *Of course, when that was announced, the press reported the glee of the Zonians that they were now exempt from U.S. income tax. . . .*

* * *

SENATOR STONE: *Wouldn't you think that we could put in the understanding that I suggested to you, the clarification of our interpretation which then, when ratified by the Congress, by the Senate, and deposited, would clarify that in a little more formal way than simple advices, since you don't want to put words back in the treaty through negotiation?*

MR. HANSELL: The one comment I would have with respect to that, and this relates to a couple of other points, is that we are dealing now with an internal U.S. matter, not a matter between the United States and Panama. That is, we don't agree with Panama how we are going to tax our citizens. That is obviously an internal matter. *I would hope we could find ways of dealing with internal matters other than as understandings.*

SENATOR STONE: You understand that if the Zonians want to try to exert their exemption from U.S. taxes that *you will be in for some lawsuits. I just wanted to figure out a way to avoid that.*

> MR. HANSELL: That would not be a lawsuit that I would want to undertake on their behalf, but *we will find a way to avoid this.*

*Panama Canal Treaty,* Hearings Before the Committee on Foreign Relations, United States Senate, on Executive FN, 95th Cong., 1st Sess. (Part I) pp. 268-269 (1977). (Emphasis added).

The exemption language in question became the focus of discussion in Panama and the Canal Zone. The local newspaper ran articles on it. The colloquy significantly points out the Department of State's refusal to 'clarify' its intent by means of an understanding. If the Panamanians were in agreement with the government's restrictive interpretation, why did Mr. Hansell not welcome Senator Stone's suggestion to correct the problem by means of an understanding? The only logical answer is that the government knew Panama was not in agreement with its interpretation and could not agree to it unless the Implementation Agreement was amended and reapproved by a Panamanian plebiscite. The government must have known that bringing this issue to the attention of the Panamanian government would have required a renegotiation of that provision, and probably others. The Department of State never fulfilled its promise. Hundreds of lawsuits have resulted.

**B. The Proceedings Below:**

This lawsuit began in August of 1981. Petitioners (hereinafter "Taxpayers"), relying on the foregoing language, filed an action in the United States Court of Claims for a refund of taxes paid during the last quarter



of 1979.[4] Although the language is in the Implementation Agreement, it was an integral part of the treaty by its reference in paragraph 9 of Article III of the Panama Canal Treaty, T.I.A.S. No. 10030.

After years of frustrating discovery caused by the government's reluctance to declassify relevant information on the negotiating history, the case came up for hearing on cross motions for summary judgment on February 23, 1984, before Chief Judge Alex Kozinski. During that hearing, the court expressed grave concern that the government failed to produce any evidence at all rebutting the clear language of the provision. The court told the parties that the evidence clearly supported the taxpayers. It postponed ruling on the motions for two weeks in order to allow the government time to supplement the record before ruling.

Two weeks later, the motions again came up for hearing. Government counsel indicated that it did not believe that there was anything else it could produce to supplement the record and that it was ready to rest its case. The court was alarmed. It invited the government's counsel to return at 2:00 p.m. with her

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[4]There were approximately 4,000 U.S. citizen employees who were working for the Panama Canal Commission on October 1, 1979. Presently, there are approximately 1,300 U.S. citizen employees. Information from the payroll department of the Panama Canal Commission indicates that approximately $416,000,000.00 has been paid in salaries to U.S. citizens from October 1, 1979, to date. The amount of taxes plus accrued interest for all U.S. citizen employees involved is conservatively estimated to be $110,000,000.00. As more U.S. citizens retire from or leave the Commission's employ and are replaced by Panamanians, the salaries and tax impact will continually scale down.

superior and someone from the Department of State to explain the apparent lack of importance the government attached to the case. The court again told the parties that the record did not support the government's position and that it was unlikely that the government would win on the existing record. Judge Kozinski told the parties that he believed the other courts that had decided this case had not examined the record as closely as he had.

At 2:00 p.m., the motions were again called up for hearing. Government counsel appeared with her immediate superior, but no one from the Department of State attended. Even after repeated requests by the court and after advising the government that the record supported the Taxpayers, government counsel steadfastly refused to supplement the record with any evidence to support its position. The court offered again to postpone the hearing for as much time as the government would need to acquire more evidence; however, the government counsel insisted that the case be decided on the record as it then existed. Significantly, the government mentioned that any evidence from Panama at that stage of the litigation would not be persuasive. The court noted that such a submission would not be dispositive, but it would be considered by the court before ruling on the motions.

Chief Judge Alex Kozinski ruled from the bench in favor of the Taxpayers. Five months later, he issued a forty-six page opinion supporting his judgment with numerous citations to the record.



On November 30, 1984, the government filed its opening brief in its appeal to the Federal Circuit Court of Appeals. In its brief, it stated that "the Panamanian interpretation would be of little relevance," and that "consulting the Panamanian Government in this case would have been of little value." The basis of its argument on appeal was that only its unilateral interpretation of treaty language was controlling, regardless of the clear language. In essence, the government still insisted that the treaty did not mean what it clearly says.

In October, 1984, a new administration came into power in Panama. On December 24, 1984, the United States gave the Republic of Panama 30 million dollars which the United States Ambassador characterized as "unprecedented" in either country's history. In February, 1985, the government, who previously insisted that such evidence was of "little value", suddenly received a telegram from the Minister of Foreign Affairs of Panama with letters from three former Panamanian treaty negotiators (who were not involved in any negotiations of Article XV(2) of the Implementation Agreement). The translated version of the letters and the accompanying telegram from the then Panamanian Minister of Foreign Affairs indicated that now, contrary to the laws of its own county,[5] the Republic of Panama does not think the treaty means what it says either. None of the letters or the interpretation that they

[5]On September 19, 1985, the dean of the University of Panama law school, Dr. Edgardo Molino Mola, executed an affidavit in which he concluded that the diplomatic cablegrams from Panama dated February 22, 1985, were illegal under the Constitution of Panama. That four page affidavit will be referred to and incorporated in Petitioners' opening brief if a writ is issued.

manifested have been approved by a Panamanian plebiscite as required by Panamanian law.

On March 1, 1985, just one working day before the appellate oral argument, the government filed its reply brief and attached the cablegrams with translations to it as an 'appendix'. No previous notice was given to Appellees and no other pleading requesting the Court of Appeals to accept such papers was filed by the government. Additionally, no explanation of how the cablegram was acquired was given to the court by the government.

On March 4, 1985, Taxpayers filed a joint motion to strike the proffered appendix informing the court of the 30 million dollar transaction with the new administration, and prior statements made by the Foreign Minister during public discussions which were inconsistent with the substance of the telegrams. The motions also noted the incompetence of the three individuals who had no direct involvement in the negotiation of the provision, and the due process problems that such a submission creates.

The only explanation offered by the government for abandoning its prior position was that diplomacy could not be artificially limited by the time frames of litigation. The government stated that it previously did not have sufficient opportunity to acquire the note and submit it during the trial proceedings. This representation was erroneous because the government had refused the repeated requests for more information made by the Claims Court. During oral argument, the government conceded that the case could be decided on the record made in the Claims Court without reference to the cablegram.



The Court of Appeals denied the motions to strike and reversed the Claims Court on May 10, 1985. Taxpayers and two other appellees filed Petitions for Rehearing relying on the record made in the Claims Court and the due process problems raised by the government's actions. The three Petitions for Rehearing were denied on July 3, 1985.

In a later case involving the same issue in the Eleventh Circuit, *Harris v. United States*, 768 F.2d 1240 (11th Cir. 1985) the Court of Appeals rejected the same materials filed by the government in the *Coplin* appeal noting:

> "we shall not consider the challenged material and we reject the government's suggestion that self-serving evidence outside the record, for which additional explanation is required, can be considered by this court."

The court noted that the government agreed during oral argument that the *Harris* case could be decided on the record without any reference to these late filed materials. The Eleventh Circuit ruled that U.S. citizen employees were exempt from U.S. income taxation on their Commission salaries by virtue of Article XV(2).

Thus, this application for Certiorari is made to review the rulings of the Court of Appeals for the Federal Circuit which undermine due process guarantees and established treaty interpretation authority. Specifically, Petitioners seek a writ for a review of the Federal Circuit's denial of their motions to strike, petitions for rehearing and the reversal of the well considered and thorough opinion of the Claims Court.

The following is the basis for federal jurisdiction in the court of first instance, the United States Claims Court. This tax refund action was authorized under 26 U.S.C. Sec. 7422(f), and jurisdiction was properly vested in the United States Court of Claims under 28 U.S.C. Sec. 1346(a) which subsequently became the United States Claims Court pursuant to the Federal Courts Improvement Act of 1982, Pub.L. 97-164, Apr. 2, 1982, 96 Stat. 25.

## REASONS WHY THE WRIT SHOULD BE GRANTED

1. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE ELEVENTH CIRCUIT COURT OF APPEALS DECISION IN *HARRIS V. UNITED STATES* AS TO THE PROPER INTERPRETATION OF THE LANGUAGE OF ARTICLE XV OF THE IMPLEMENTING AGREEMENT TO ARTICLE III OF THE PANAMA CANAL TREATY AND ON HOW *EXTRA RECORD* MATERIALS SHOULD BE TREATED IN AN APPELLATE PROCEEDING.

The decision of the Court of Appeals for the Eleventh Circuit in *Harris v. United States*, 768 F.2d 1240 (11th Cir. 1985) directly conflicts with the decision of the Federal Circuit in the instant case in two major areas. First, the two courts directly disagree on the interpretation of the plain language of the Implementation Agreement. Second, the two courts are divided on how *extra record* materials should be treated in an appellate proceeding. These direct conflicts were noted by the Eleventh Circuit in its opinion made a part of the separately bound joint appendix filed concurrently herewith.



### A. The Clear Language and The Irreconcilable Interpretations.

Unlike the Federal Circuit, the Eleventh Circuit, by affirming the Southern District Court of Georgia in *Harris v. U.S.*, 585 F.Supp. 862 (1984), decided that the plain language of the Implementation Agreement conferred reciprocal tax exemptions to the U.S. citizen employees of the Commission. The Eleventh Circuit left the district court's reasoning undisturbed. In examining the record after rejecting the late submission of the diplomatic note, the Eleventh Circuit drew the same conclusions reached by the Claims Court whose opinion is contained in the separate appendix. *Coplin v. U.S.*, 6 Cl.Ct. 115 (1984) *reversed at* 761 F.2d 688. The Eleventh Circuit's careful analysis of its record revealed that the negotiating history supported the reciprocal tax exemption interpretation rather than the restrictive meaning placed upon the language by the government. In essence, the record reveals facts about this case that paint a far more complex scenario than that suggested by the government and blindly accepted by the Federal Circuit Court of Appeals.

The Eleventh Circuit followed the premise that international agreements, while possessing the force and effect of law, should be construed more like contracts than statutes. *See Santovincenzo v. Egan*, 284 U.S. 30, 40, 52 S.Ct. 81, 84, 76 L.Ed. 151 (1931); *Tucker v. Alexandroff*, 183 U.S. 424, 436 (1902). The government attempts to impart ambiguity to and contradict the plain meaning of Article XV(2). *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180, 102 S.Ct. 2374, 2377, 72 L.Ed.2d 765 (1982) states that "[w]hen the parties to a treaty both agree as to the meaning of a

treaty provision, *and that interpretation follows from the clear treaty language*, we must, absent extraordinarily strong contrary evidence, defer to that interpretation." (Emphasis Added).

Only when language is susceptible to differing interpretations, extraneous materials bearing on the parties' intent should be considered. *Hidalgo County Water Control and Improvement District v. Hedrick*, 226 F.2d 1, 8 (5th Cir. 1955), *cert.denied*, 350 U.S. 983, 76 S.Ct. 469, 100 L.Ed 851 (1956). A party should not be allowed to abuse the rules to impart an ambiguity where none exists, *see National Surety v. McGreevy*, 64 F.2d 899 (8th Cir. 1933); especially when any ambiguity should be construed against that same party who drafted the language. Restatement (Second) of Contracts, Sec. 206 (1979).

In this case, the language of Article XV(2) is clear and unambigious and that should be the focus of any court's scrutiny.

The Eleventh Circuit first examined the language of the provision in issue. It noted that the district court, like the Claims Court, found it to be "unmistakably clear", *Harris*, 585 F.Supp. 862. It also found that Paragraph 2 of Article XV of the Implementation Agreement speaks in "clear and sweeping terms." The language explicitly states that U.S. citizen employees of the Panama Canal Commission *"shall be exempt from any taxes*, fees, or other charges on income received as a result of their work for the Commission". (Emphasis Added).

In contrast, the majority opinion in *Coplin, Supra.* ignored the first rule of treaty interpretation, i.e. it



must review the language for clarity. To illustrate the contrast, the Federal Circuit failed to make any reference to the pre-supplemented record to justify reversing the Claims Court's findings. It simply concluded that "[s]ince both treaty parties agree that paragraph 2 was not intended to create an exemption from United States domestic taxation, the trial court's decision cannot be upheld", *Coplin v. United States*, 761 F.2d 688, at 692. It made no comment on the clear language, or the evasive and misleading representations of the State Department during the ratification process. The Federal Circuit relied on the diplomatic cablegrams in its deliberations. However, those cablegrams have recently come under the scrutiny of an expert in Panamanian Constitutional law who found them to be illegal. *See fn.* 5, *Supra.*

In a separate concurring opinion, the Federal Circuit recites that it examined the record without benefit of the diplomatic note and concludes that the exemption language had "no relevance to taxation by the United States of its own citizens". Instead of referring to specific portions of the record to support its judgment (because such support does not exist), the court judicially changed the title of Article XV(2) from "Taxation" to "Panamanian Taxation." This is contrary to several Supreme Court Rulings.

> "It is our duty to interpret [a treaty] according to its terms. These must be fairly construed, but we cannot add to or detract from them." *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 11 (1936).

Words in a treaty "* * * are to be taken in their ordinary meaning * * * and not in any artificial or

special sense impressed upon them by local law." *Geofroy v. Riggs*, 133 U.S. at 271; *accord Santovincenzo v. Egan*, 284 U.S. at 40; *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. at 180. "Interpretation of [a treaty] must, of course, begin with the language of the Treaty itself." *Id.* Petitioners believe that such action is an abuse of judicial discretion that can only be corrected by competent review. There is no need to go beyond clear treaty language to understand it.

**B. The Motions To Strike.**

In *Harris, Supra.*, the Eleventh Circuit granted the Appellees' Motion to Strike the late filed diplomatic note. It rejected the government's argument that such a supplement can be made. The court limited itself to reviewing the record set in the trial court. Its decision was based on well established precedents existing in the Fifth Circuit and its own court. The Eleventh Circuit also noted, in a footnote, the suspicious circumstances surrounding the acquisition of the diplomatic note and the 'strangely identical' nature of the letters upon which it was based.

In contrast, the rulings by the Federal Circuit conflict with well established canons of treaty construction, the rules of Appellate Procedure (F.R.A.P.Rules 10 and 30, 28 U.S.C.), and the Federal Rules of Evidence, Rule 201, 28 U.S.C. The Appellate Rules indicate that the record consists of only items filed in the trial court and the appendix consists of only items originating from the record. Federal Rules of Evidence, Rule 201, 28 U.S.C. indicates that judicial notice is proper only where the reliability of a particular piece of evidence is unquestionable. Additionally, sufficient notice and an



opportunity to be heard must be afforded to all parties in order to contest it.

Petitioners suggest that the note's content is unreliable as evidence given the special political, economic and financial relationship between the governments of the United States and Panama. There is no need to show a direct causal relationship between the note's production now, after several years of litigation, and the 30 million dollar unprecedented donation from the United States to Panama made December 24, 1984. The donation simply illustrates the nature of the relationship between the two governments. It is this relationship, not necessarily the donation itself, which taints the note.

The *Coplin* appellate court relied on *Sumitomo Shoji America, Inc. v. Avagliano, Supra.* to support its consideration of the diplomatic note. It also cited *Factor v. Laubenheimer*, 290 U.S. 276, 54 S.Ct. 191, 78 L.Ed. 315, *United States v. Reynes*, 50 U.S. (9 How.) 127 (1850) and *Jones v. United States*, 137 U.S. 202 (1890). None of these cases are applicable precedent for allowing contradictory statements to supplant clear treaty language which was ratified without any reservation or understanding to restrict its meaning. In all four of those cases, the materials which those courts took judicial notice of were unquestionably reliable. In this case, the reliability of the diplomatic note is in question and the Eleventh Circuit refused to consider it.

Additionally, in *Sumitomo*, the government had intervened as *amicus curiae* in order to preserve harmonious relations with Japan. In this controversy,

the government is the defendant with a direct financial stake in the litigation. Its reading of Article XV(2) has been challenged by the affected taxpayers since the inception of the Panama Canal Treaty. This factual basis significantly erodes the reliability of documents obtained outside the record, especially when the litigant refused to introduce or even attempt to acquire such evidence in the trial court after repeated invitation.

The Federal Circuit's reversal injects turmoil into the established rules of treaty interpretation. It also undermines the rules of Appellate Procedure and the Federal Rules of Evidence.

This conflict between the circuits on the proper interpretation of Article XV of the Implementation Agreement affects hundreds of people working for the Panama Canal Commission. The rules of construction for treaty interpretation are placed in jeopardy and confusion, which, in turn, jeopardizes the honor of our government who is charged with recognizing and protecting the rights conferred by such agreements. *See Chew Heong v. United States*, 112 U.S. 536, 540, 5 S.Ct. 255, 256, 28 L.Ed. 770 (1884). Firm guidelines for proper treaty construction rules can be established only through a resolution by this Court of the questions presented herein.

## 2. THE DECISION BELOW CREATES SERIOUS DUE PROCESS PROBLEMS THAT DIRECTLY THREATEN A CITIZEN'S RIGHT TO A FAIR REVIEW.



When treaty language is crystal clear, it is fundamentally unfair to restrict its effect by judicially limiting its meaning by relying on *extra record* evidence that is suspect and unreliable. It is a fundamental principle of democratic governments that people are governed by written laws rather than the whims of persons in power.

In this case, taxpayers have prosecuted their case relying on language which clearly supports them. The government has been given numerous opportunities in the trial court to present evidence which supports its position. Instead of taking advantage of such opportunities, the government confused the issues by presenting questionable evidence. Further, it took a litigating position in the trial court that evidence of Panama's intent would be of little, if any, value and would certainly not be dispositive of the case. The lower court recognized this issue and advised the government that such evidence might be worthy of consideration even though it would not be dispositive. Without warning, and at the last possible moment in the appellate proceedings, the government reversed its litigation stance and submitted documents which are "strangely identical" to one another and which were acquired shortly after Panama became the beneficiary of a large economic gift from the United States. The action of the Federal Circuit, in accepting the untimely documents as dispositive, literally usurps the trial court of its function and duty to make an interpretation.

The essence of the due process problems presented by this scenario is easily shown. If such evidence had been presented at trial, taxpayers would have had an

opportunity to present other evidence attacking the credibility and legality of the government's submission. However, by its actions, the appellate court has denied this opportunity to the taxpayers. Taxpayers have been deprived of their day in court.

Other due process problems focus on basic fairness. Can the government's interpretation controvert language which is crystal clear by itself and needs no interpretation? Can the appellate court disturb the findings of the lower court without pointing out the error or errors allegedly made in the lower court's reasoning?

The government advanced the proposition in the past that the Article XV language was inartfully drafted by its negotiating team. It implied that the language was the result of a mistake ignoring the fact that at least three separate drafts were made, each containing substantive amendments. The U.S. negotiating team was a distinguished and experienced group. It refused to take any opportunities to amend or clarify its interpretation long before the treaties were ratified. On at least two separate occasions, before ratification, an amendment was recommended: first, by an agency within the Executive Branch and then by Richard Stone of the U.S. Senate. These recommendations were rejected. All of these arguments were thoroughly addressed by the lower court. None of them were addressed by the appellate court.

U.S. citizen employees of the Commission have relied on this unabridged tax exemption language in presenting their claims. However, instead of amending the troublesome language as it was asked to do, the government has taken the position that the language



simply does not mean what it says. The government has invoked the rules of construction to impart an ambiguity where none exists. Instead of resolving the issue, the government has clouded it. Relying on the plain language, taxpayers are misled by their own government who now seeks to amend the treaty judicially where it failed to do so diplomatically.

The government cannot be allowed to use such unrestrained power and unbridled discretion in interpreting treaties. Otherwise, the words and the treaties themselves become irrelevant. Such abuses of power should be reviewed to prevent an erosion of due process rights afforded individuals under the Fifth amendment and to prevent violations of the Federal Rules of Appellate Procedure. Only a review by the Court of the questions presented herein can resolve the conflict between the unrestrained use of the Executive Department's foreign relations power with the due process rights of individuals.

## 3. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING EFFECTIVE ADMINISTRATION OF TAX LAWS.

Settlement of the questions by this Court is in the public interest because petitioners' cases are representative of a problem confronting hundreds of taxpayers. Indeed, the very question raised here, and on which the Federal and Eleventh Circuits have divided, is presented in a number of cases now pending before the Foreign Operations District of the Internal Revenue

Service, the Appellate Division of the Internal Revenue Service, the collection division of the Internal Revenue Service, various other district offices of the Internal Revenue Service in different parts of the country depending upon where U.S. citizen employees of the Panama Canal Commission have filed their returns, the Tax Court, and other district courts throughout the country. The undersigned presently represents hundreds of taxpayers with claims pending in the United States Claims Court. Additionally, he has received hundreds of phone calls from interested potential litigants and attorneys bringing claims in other forums.

The question is essentially one of treaty interpretation. Petitioners contend the second paragraph of Article XV is unequivocally clear in its tax exemption language. When this language came to the attention of the Senate Foreign Relations Committee, Senator Stone suggested that an 'understanding' be attached to the instruments of ratification to clarify the interpretation that the Department of State represented to that committee. He immediately saw the multitude of lawsuits that such language would spawn if the United States attempted to restrictively interpret it. The Department of State let the suggestion slide by. This inexplicable departure from standard foreign relations procedure and practice can only evidence and underscore the fact that both the United States and Panama acquiesced to the reciprocal tax exemption evidenced by the clear language when it (the treaty) was approved by the Panamanian plebiscite and the U.S. Senate and ultimately ratified, unabridged.

Indeed, substantial litigation has resulted, and more is expected. Taxpayers are lured into court to assert



rights that are obvious on the face of the Implementation Agreement. Now, with a conflict in the Circuits, disparate tax treatment resulting solely from a fortuity of forum or circuit can be prevented only through the resolution by the Court of the questions presented.

## CONCLUSION

For all of the above reasons, Petitioners submit that a review in this case is clearly warranted to resolve the conflict in the circuits, to establish the interpretation of Article XV(2) of the Implementation Agreement of Article III of the Panama Canal Treaty of 1977, to reinforce the rules of interpreting treaties and to protect the due process rights of the affected taxpayers. Accordingly, Petitioners pray that the Court issue a writ of certiorari to review the rulings of the United States Court of Appeals for the Federal Circuit.

Respectfully Submitted,

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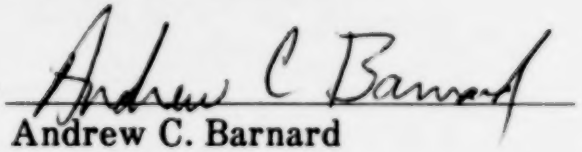
By 
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